of record. I say that such a view of the constitutional intent in this respect would not be unreasonable.

And yet, without adverting to these considerations, the Supreme Court has flatly decided, in *Ex parte Robinson*, that the act of Congress of 1831 applies to the circuit and district courts of the United States; that these courts were created by act of Congress; their powers and duties depend upon the act calling them into existence, and the act is to them the law specifying the cases in which summary punishments for contempts may be inflicted. E. W. SAUNDERS.

[*To be continued.*]

CONTRIBUTION BETWEEN CO-SURETIES.

PACE v. PACE—(4 Va. Law Reg. 171.)

As one who has as yet been unable to reconcile the decision in this case with what I conceive to be the true principles by which it should have been governed, with the permission of the editor I will state briefly the difficulties which have confronted me in my efforts to do so.

The views of the court are certainly very ably presented in the opinion of Judge Harrison, and I need hardly say that it is with unfeigned trepidation that I venture to controvert them, a feeling which is very far from being relieved by the circumstances that both the editor of the REGISTER and Mr. M. P. Burks are pronouncedly in accord with the court. But I am constrained, nevertheless, to think that the conclusion reached by the court was illogical and the result inequitable.

It will be recalled that Talbott, as principal, and John R. Pace and James B. Pace, as his sureties, made and delivered to Cheek a note for—let us say in round numbers—$16,000. Talbott died entirely insolvent. John R. Pace also died, leaving assets sufficient to pay only fifty cents on the dollar of his debts. After the latter's death, James B. Pace paid the note and then set it up as a debt against the estate of John R. Pace, claiming dividends or apportionments in the distribution of that estate on the whole amount so paid by him until he had received one-half thereof.

The court sustained the contention of James B. Pace, and the result was that he realized from the estate of John R. Pace the latter's full

half of the note. Thus James B. Pace came out whole, as against his co-surety, while the other creditors of John R. Pace lost, I suppose, half of their debts.

It is undeniably true that a *surety* who pays the debt of his *principal* is entitled to be subrogated to all the rights and remedies of the creditor *against the principal.* In this case James B. Pace was undoubtedly entitled to be subrogated to all the rights of Cheek against Talbott. But what were his rights against the estate of John R. Pace?

It will hardly be questioned that in order to be entitled to subrogation, the person claiming it must have paid a debt for which, as between him and the person against whom or whose estate subrogation is sought, the latter is *primarily* liable. *Rosenbaum* v. *Goodman,* 78 Va. 121; note to *Mobile Insurance Company* v. *R. R. Co.,* 44 Am. St. Rep. 731.

A debt once paid by the party *primarily* liable therefor, must be forever dead both at law and in equity. By such payment it is *necessarily extinguished.*

Co-sureties, as between themselves, are simply co-debtors, and each is principal debtor for his portion of the common debt and *surety for the other's portion only. Horton* v. *Bond,* 28 Gratt. 815, 825; *Dobyns* v. *Rawley,* 76 Va. 537, 538.

So, in the case under consideration, James B. Pace and John R. Pace (Talbott being eliminated) as between themselves—and James B. Pace was one of *themselves*—were each *principal* debtor and primarily liable for *his own half* of the debt due Cheek, and *surety for the other's half only.* When, therefore, James B. Pace paid the $16,000, that portion for which he was primarily liable, as between him and John R. Pace—half of it—was *extinguished;* and, having paid only $8,000 *for John R. Pace,* he was not entitled to occupy the position of one who had paid $16,000 *for him.*

In *Kendrick* v. *Forney,* 22 Gratt. 748, 752, the right to subrogation is shown to be based upon the idea that the party asserting it has done that which it was the duty of the party against whom the equity is asserted to have done. Thus the court (p. 752) says:

"He (the surety) has no equity to be subrogated to the rights and securities of the creditor against the debtor for what he has not paid *for him;* but only for what he has paid *for him.*"

Plainly then, it seems to me, the only foundation James B. Pace had for substitution was the payment of $8,000 he had made *for John*

R. Pace. No right against others could accrue to him by reason of the payment he had made *for himself.* To keep *his part* of debt longer alive for any purpose, after its satisfaction by him, or to treat it for any purpose as if due by John R. Pace to James B. Pace, was simply to reverse the positions of the parties and *suffer the principal to be subrogated against his surety.*

Under the statute, all the creditors (there being no preferred ones) of John R. Pace were entitled to equal participation, in proportion to the amounts of their respective debts, in the assets of his estate. It cannot be contended that John R. Pace's estate owed James B. Pace more than $8,000. Let us suppose there were $8,000 of other debts of equal dignity, and that the estate of John R. Pace amounted to $12,000. The other creditors would seem to be clearly entitled to $6,000 and James B. Pace to $6,000; but, by permitting James B. Pace to participate upon the basis of the aggregate amount of what was really due to him, *plus* what he himself had owed and discharged, he got out of John R. Pace's estate $8,000 (his *whole* debt), while the other creditors got only $4,000 (*half* of their debts), thus, in effect, taking $2,000 from the other creditors and bestowing it upon James B. Pace. Was he entitled to this advantage—to receive two dollars on his debt for every one dollar paid on the other indebtedness of equal dignity and amount? He had no shadow of a claim to the *extra* dollar for dollar, except upon the ground that he had paid Cheek what he himself owed him—a debt for which (Talbott being left out of view) he himself was bound *first* of all the world.

In *Miller* v. *Holland*, 84 Va. 659, it is said of the doctrine of subrogation, that it is a creature of equity, and justice is its object; that it is founded upon principles of equity and benevolence, and is only to be administered in a clear case, and never to the prejudice of the rights of others. And, in *Fidelity Insurance Company* v. *R. R. Co.*, 86 Va. 16, it is said: "This equitable remedy is allowed only when it does not conflict with the legal or equitable rights of other creditors of the common debtor."

Can these things be longer said of it? Under the court's decision the other creditors of John R. Pace would have been no worse off if James B. Pace, instead of being a co-obligor, or rather co-debtor, with John R. Pace, and in every way equally bound along with him for the debt, had himself been the payee entitled to the whole amount. The result would have been just the same if John R. Pace *alone* had be-

come surety for Talbott, and James B. Pace had been at the antipodes or had died fifty years before John R. Pace was born.

But it is urged by the editor that, inasmuch as Cheek could have proved for the full amount of the debt against the estate of John R. Pace, and the latter's other creditors could not have complained if this had been done, therefore they have no right to complain because James B. Pace was allowed to do so.

I do not think this conclusion is a sound one, if the premises be admitted. It may be that if James B. Pace had refused to pay up his part of the debt the other creditors of John R. Pace could not have protected themselves had Cheek chosen to prove the whole debt against their debtor. But circumstances alter cases. James B. Pace having satisfied and extinguished his part of the indebtedness (thereby doing but his simple duty) it does not follow that he should be allowed to suppress that circumstance in its effect upon the rights of others.

One who has done only his plain duty deserves no special consideration, and it ought not to lie in his mouth to gainsay the just benefits or advantages which result to others from his act. Duty were as well left undone if its performance must be rewarded by the price of its disregard.

A complete answer, however, to the suggestion of the editor lies in what has already been said. James B. Pace was *surety* for John R. Pace to the extent of $8,000 *only*, and it was, therefore, with respect to *that amount only*, when paid, that the right of subrogation could arise. If this be true, the other creditors of John R. Pace *have* a right to complain if James B. Pace has been accorded, at their expense, more than he was entitled to; and this, regardless of what their rights might have been under other conceivable conditions which do not exist.

It seems to me that the court fell into error by losing sight of the *extinguishment*, as to John R. Pace, of half the Cheek debt by reason of its payment by James B. Pace.

So far as John R. Pace was concerned, James B. Pace's half of the debt was as thoroughly extinguished when he paid it as it would have been if it had been paid by Talbott.

Between himself and John R. Pace, James B. Pace was as truly the principal debtor, as to half the debt, as Talbott was, as between himself and both the Paces, principal debtor for the whole. If James B. Pace was entitled to subrogation, with respect to *his* half of the debt, against John R. Pace, then Talbott, by paying the whole debt,

would have been entitled to subrogation against both the Paces—his sureties. *Res ipsa loquitur.*

Hitherto, whatever doubts I may have at first entertained with regard to decisions of our admirable court, have readily yielded to deliberation and the examination of other authorities. In this instance the adjudged cases are few and, perhaps, irreconcilable. But it seems to me that a due regard for the indisputable principles upon which the doctrine of subrogation is founded must inevitably lead to the conclusion at which I have arrived. J. T. COLEMAN.

Lynchburg, Va.

[The gist of our learned friend's argument is, that when the living surety discharged the debt to the creditor, the half ultimately due by him was completely extinguished—on the general principle that payment by the primary debtor of necessity extinguishes the debt. And it is upon the assumption that this principle is of universal application that his very ingenious argument is based. If this assumption be conceded, then his conclusions necessarily follow, and the court was in error in permitting the living surety to prove for that portion of the debt thus extinguished.

But whether this principle will not yield to the requirements of justice, was the very question before the court, and this question the court answered in the affirmative.

Mr. Coleman is especially solicitous for the rights of the other creditors of the deceased surety. He insists that these have been grievously wronged in the result, and he champions their cause with characteristic vigor and ingenuity.

In order to make the issue as concrete as possible, let us take Mr. Coleman's own illustration, and inquire whether these other creditors are really entitled to the sympathy they receive at his hands, and let us see on whose side the real equity lies: Suppose, at the death of the deceased surety, his estate to be worth $12,000; the debt held by Cheek (on which both sureties are bound) to be $16,000; and the other debts against the estate of the decedent to be $8,000. Let us further suppose that immediately following the surety's death, Mr. Coleman is retained to represent the latter debts of $8,000, and is called upon to advise as to the solvency and value of these debts.

Beyond all doubt his advice would be that in the administration proceeding Cheek could prove for $16,000 and his own supposed clients for $8,000, making a total of $24,000 of liabilities, with $12,000 of assets—and therefore that all creditors would receive a fifty *per cent.* dividend; his own clients receiving $4,000, and Cheek $8,000. Howsoever unsatisfactory to the clients this reply might be, and howsoever pressed to exhaust every professional resource to avoid such a result, Mr. Coleman would advise that, whether gauged by the principles of equity or of morals and good conscience, fifty *per cent.* of its face value was the full measure of each creditor's debt. We understand Mr. Coleman to concede this.

Glancing for a moment at the situation of the living surety, we find that his ultimate liability is only his half of the joint debt of $16,000, since it has been

ascertained that the deceased surety's estate will pay fifty *per cent.* of that debt, or $8,000. In other words, in the present aspect of affairs (the situation as it existed at the death of the co-surety), each surety will pay one-half of the joint debt—no more and no less.

Now comes the change in the situation. The living surety, equally bound with the estate of the decedent for the whole of the $16,000 debt—with $8,000 of this debt already provided for and practically set apart for its payment out of the estate of the deceased surety—puts his hand into his pocket, and, in fulfillment of his solemn pledge in the making of the original contract, discharges the debt in full—his co-surety's share as well as his own. What now shall be done with the $8,000 of the decedent's estate which, as we have seen, these other creditors have no claim to, but which is already ear-marked and held by the administrator of the deceased surety for payment to Cheek on the joint debt? Shall the circumstance that the living surety has done his duty by discharging the entire debt, at once enhance the value of the claims held by other creditors, at the expense of the honest surety? And shall the latter find that by doing his duty he is caught in a snare from which he can only escape by a loss of $2,000—a loss he would not have suffered had he been able and willing, by hook or by crook, to evade fulfilling his obligation to the common creditor? Is this justice? Is it equity? Is it in accordance with equitable principles that a man shall suffer hurt by paying an honest debt, and shall be rewarded by evading payment? If our learned friend would answer these questions affirmatively, what answer will he make to his surprised clients when they require an explanation of the good tidings that whereas their claims were worth fifty cents on the dollar, they now are worth seventy-five? The answer would probably be something like this: "When your debtor died he left estate enough to barely pay each of his creditors a dividend of fifty *per cent.* But by the application of a universal principle of law, that when he who pays a debt for which he is primarily bound, the debt becomes extinguished, Mr. Pace, the living surety, got caught in a trap by paying the whole of the $16,000 debt for which he and your deceased debtor were jointly bound; whereby he was only able to prove for half the debt in the administration proceeding; and thus he lost $2,000 which the court has ordered to be distributed amongst you gentlemen, and hence you will receive seventy-five cents in the dollar. In other words, you gain $2,000 by the honesty and promptness of Mr. Pace, the living surety, in discharging a debt to a stranger of whom you never heard, and with whom you have no concern—and a debt for which your debtor was equally bound with him—which sum of $2,000 the same honest debtor loses."

This answer might satisfy the creditors into whose pockets the ill-gotten gain would go, but we think it would not satisfy the conscience of our friend.

On the other hand, the view adopted and enforced by the court gives Mr. Coleman's supposed clients precisely what they were entitled to before the living surety paid the debt, and therefore does not deprive them of one cent to which they were justly entitled. It secures the living surety against loss by reason of his payment of the debt in full. It encourages prompt payment of debts. It does no injury to the estate of the deceased surety, since it was already bound for one half of the debt. If the court's ruling does justice to the living surety and no injustice to the deceased surety's estate, or to his other creditors, or to any other person, what more complete justice could be attained?

After all, the difficulty, if there be difficulty, arises rather out of the form of the remedy than the substance of the relief granted. In form, the court allowed the living surety to prove for the full amount of the debt paid by him, including that half for which he was himself primarily bound. In substance the court permitted the paying surety to come into the administration proceeding and, by subrogation, to receive the $8,000 to which Cheek, the common creditor (whom he had satisfied), was entitled,—that amount being already practically set apart and appropriated to the Cheek debt. In short, the surety was simply subrogated to the rights of the creditor. Courts of equity look at substance, not at forms. In form the court has allowed the surety to prove for more than was due from the co-surety. In substance the surety has been subrogated to the rights of the satisfied creditor, and has received the dividend to which that creditor was entitled. Whether the amount held by the administrator for the Cheek debt be paid to Cheek himself or to his equitable assignee, the living surety, is no concern of other creditors, who have received their just dividends to the uttermost farthing.

As said in our previous comments on the decision (4 Va. Law Reg. 257), the circumstance that the co-surety receives contribution in full, while other creditors receive but fifty *per cent.* of their debts, results from the superior equity of subrogation in the co-surety. The latter does not come into the administration proceeding with merely a debt for $8,000, upon which he is to receive dividends along with other creditors in the same class, but he comes with a claim to the *specific $8,000 to which his satisfied creditor was entitled.*

As already shown, the advantage secured by the living surety through this right of subrogation was not at the expense of the other creditors. They have received the full amount to which they were entitled. They have merely failed to profit by a transaction which does not in any manner concern them. Any transaction between Cheek and the living surety is *res inter alios* as to them. It can be no concern of theirs whether this $8,000 to which Cheek is entitled goes directly to him or to the surety who, by satisfying him, stands in his shoes, and is the equitable assignee of every right belonging to him and to every advantage flowing from that right.—EDITOR VA. LAW REGISTER.]

THE DELINQUENT TAX LAW IN VIRGINIA.

In connection with the many applications being filed in various sections of the State to buy delinquent lands under the provisions of the amendment of section 666 of the Code, approved February 11, 1898, and the various newspaper criticisms of what they term "that obnoxious law," it may be an appropriate time to review, briefly, the history and policy of that statute, and the several amendments thereto, for it is quite a live subject in certain portions of the State at this time.

As every conclusion, whether of law or of fact, is based upon some antecedent proposition, so every statute in the Code is supposed to be